United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2326

To be argued by
DANIEL A. ZIMMERMAN

In The

United States Court of Appeals

For The Second Circuit

In re

D.H. OVERMYER CO., INC. (Alabama), et al,

Debtors.

NORMAN S. GLAUBER, JR.,

Applicant-Appellee,

- against -

D.H. OVERMYER CO., INC. of OHIO, Debtor, and ROBERT P. HERZOG, Receiver,

Respondent-Appellants.

LEONARD H. WOLFBERG and JOYCE WOLFBERG,

Applicant-Appellees,

- against -

(Continued on next page)

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR APPLICANT-APPELLEES

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UNITED STATES COURT OF APPEALS

For The Second Circuit

Docket No. 74-2326

In re

D. H. OVERMYER CO., INC. (Alabama), et al,

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NORMAN S. GLAUBER, JR.,

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LEONARD H. WOLFBERG and JOYCE WOLFBERG,

Applicant-Appellees,

-against-

D. H. OVERMYER CO., INC. (Colorado), Debtor, and ROBERT P. HERZOG, Receiver,

Respondent-Appellants.

RACHEL FANABERIA,

Applicant-Appellee,

-against-

D. H. OVERMYER CO., INC. (Florida), Debtor, and ROBERT P. HERZOG, Receiver,

Respondent-Appellants.

HAROLD Y. I. FANABERIA,

Applicant-Appellee,

-against-

D. H. OVERMYER CO., INC. (New York), Debtor, and ROBERT P. HERZOG, Receiver,

Respondent-Appellants.

ON APPEAL from the UNITED STATES DISTRICT COURT

for the SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPLICANT-APPELLEES

Preliminary Statement

In the proceedings for arrangement under Chapter XI of the Bankruptcy Act of D. H. Overmyer Co., Inc. (Ohio) and thirty-eight affiliated corporations, the four applicant-appellees, being the owner-landlords of certain warehouse properties leased to certain of the debtors, applied to the bankruptcy court for a determination that the leases between them as landlords and the respective debtors as tenants were terminated and further requesting immediate possession of the warehouse properties. On August 6, 1974, Bankruptcy Judge Roy Babitt entered four separate orders terminating the leases between appellee-landlords and the respective debtors and granting appellee-landlords possession of the warehouses effective July 31, 1974. The District Court, Honorable Henry F. Werker, District Judge, affirmed the orders of Bankruptcy Judge Babitt in an opinion dated September 27, 1974. The receiver and the four debtors appealed from the four orders and the affirmance thereof, as well as eleven similar orders. All fifteen appeals are being heard on an expedited basis. This brief represents the positions of the following four landlord-appellees:

Name	Warehouse
Norman S. Glauber, Jr.	Columbus #3
Leonard and Joyce Wolfberg	Denver #4
Rachel Fanaberia	Miami #7
Harold Y.I. Fanaberia	Buffalo #2

Statement of the Case

Each of the four landlords represented by this brief exercized contractual options to terminate leases with Chapter XI debtors, carefully following the terms of the written leases existing between them and the debtors. In two instances, (Denver #4 and Columbus #3) the landlords acted on non-bankruptcy defaults several months before the Chapter XI petitions were filed. In the other two instances, the landlords relied on the bankruptcy proceedings as an event of default in electing to terminate the leases. While each landlord relied on specific events of default, the trial record demonstrates that other events of default existed as well.

When each of the debtors filed its petition for arrangement under Chapter XI of the Bankruptcy Act, each of the four landlords applied to the bankruptcy court for a determination that its lease with the debtors had been terminated and for the immediate possession of the property and for other incidental relief. The court appointed receiver answered each application, denying knowledge or information sufficient to form a belief regarding the allegations contained therein and setting forth two or three affirmative defenses. The respective debtors in each instance adopted the receiver's answer. At trial, the receiver and debtors (hereinafter referred to as "Overmyer") did not contest the existence of the events of default or that the proper steps were taken by the respective landlords in terminating the leases. Rather, Overmyer concentrated on establishing its equitable defenses.

The first affirmative defense was that the bankruptcy court had the equitable power to prevent a forfeiture of Overmyer's leasehold interest and that under the circumstances of each case, the court should exercise that discretionary power. The second affirmative defense was again keyed to equitable relief. It assumed that the court would permit

termination of the leases but requested the court to leave Overmyer in possession of the leased property for a reasonable period of time.

While these affirmative defenses contain many factual allegations, Overmyer confined its actual proof to an attempt to establish that Overmyer was operating each property at a profit and that forfeiture would hand that profit, characterized as a "windfall," over to the landlord.

In an opinion dated July 23, 1974, Bankruptcy Judge Roy Babitt found that the "equitable concerns are simply not robust enough to turn these landlords away," and granted the basic relief requested by the landlords, i.e., a determination that the leases were terminated and immediate possession of the property.

Orders were entered on August 6, 1974 and Overmyer prosecuted an expedited appeal to the district court. The issues on appeal were limited. As noted by District Judge Werker in his opinion affirming the orders of Bankruptcy Judge Babitt:

> "The appellants assert several arguments in this appeal. First that the Bankruptcy Judge erred in refusing to exercise his equitable power to prevent the forfeiture of the Overmyer leases. Second, that it was error for the Bankruptcy Judge to include in his decision those cases in which the landlords did not rely on bankruptcy termination clauses to recover possession. And finally, that the Bankruptcy Judge failed to make appropriate findings of fact and conclusions of law." (13)

Now, for the first time, in regard to the Denver #4 and Columbus #3 warehouses, Overmyer raises an additional issue as to whether those landlords properly terminated the leases.

The Bankruptcy Judge's Opinion. There were twenty-four applications litigated to a decision before the Bankruptcy Court. Each application raised certain distinctive facts and contained certain common facts. The Bankruptcy Court seized upon the common elements in fashioning its decision. Each landlord, and more particularly the four landlords represented by this brief, exercized his contractual rights to terminate the respective debtor's leasehold based upon one or more events of default. Two of the four proceeded prior to petition filing and did not rely on the "bankruptcy clause." The other two relied on the existence of substantial monetary defaults as well as the operable "bankruptcy clause." The

bankruptcy court's opinion appeared to treat on the "bankruptcy clause" defaults, much in the manner of a judgment on the pleadings, because even the landlords relying on pre-petition defaults could wear the proverbial "belt and suspenders" by mailing an additional termination notice. The existence of the events of default and proper termination notices in conformity with the contractual terms were not contested before the trial court. The landlords' direct case was easily made without serious objection.

Judge Babitt's opinion therefor recognized the Congressional and Judicial expression that the landlords had a very strong legal position. Overmyer's defensive posture was an equitable defense addressed to the courts' discretion. The proof submitted in support of this equitable defense was less than complete and did not conform to the allegations contained in the answers. It limited itself to a proof intending to show that each contested warehouse was profitable, and by implication, that return of the warehouses to the landlords would result in a windfall to the landlords. While the proof in each case did not support a finding of profitability, (the Miami #7 warehouse showed a net loss), the court assumed

each warehouse was profitable and determined that that element was insufficient basis for it to stymie the affect of Bankruptcy Act §70b which declared lease forfeiture clauses enforceable.

The Bankruptcy Judge did not articulate findings or conclusions regarding the specific profitability of each warehouse; the court's jurisdiction to prevent a pre-petition termination of a lease; the quantum of monetary defaults in each case; or the debtors' lack of "clean hands" which is a bar to equitable relief, United States v. Forness, 125 F.2d 928, 940 (2d Cir. 1942); or various other considerations all which were present and mitigate against the bankruptcy court's exercise of its equitable powers on behalf of the debtors.

The District Court's affirming opinion. On appeal to the District Court, Overmyer's main argument was that the Bankruptcy Judge erred in refusing to exercise his equitable power to prevent forfeiture of the leases. Overmyer also argued that the Bankruptcy Judge erred in including non-bankruptcy clause default cases in his opinion and that the Bankruptcy Judge failed to make appropriate findings of fact and conclusions of law.

District Judge Werker, demonstrating a definite familiarity with the entire record, found ample basis in that record to support the Bankruptcy Judge's refusal to prevent forfeiture. Applying the appellate standard under which the trial court could only be reversed if there was a showing of abuse of discretion, the district court affirmed.

The Issues

The only issues really before this court are whether Bankruptcy Judge Babitt's refusal to exercise the bankruptcy court's equitable powers to prevent lease forfeiture constituted an abuse of discretion; and whether District Judge Werker's application of that appellate standard was proper.

The Facts

The general facts are set forth in the July 23, 1974 opinion of Bankruptcy Judge Babitt (Appellants' Appendix at 27-55) and the affirming opinion of District Judge Werker (Appellants' Appendix at 7-25) and will not be repeated herein. This Brief will limit itself to a brief statement as to the

specific facts regarding each of the four landlords.

Denver #4; Leonard and Joyce Wolfberg

In August of 1967, the Wolfbergs purchased certain real property located in Denver, Colorado (known as the Denver #4 warehouse) from Overmyer and leased the property back to Overmyer. Under the terms of the lease Overmyer was to pay the Wolfbergs $2,500.00 per month as the net rent. In addition, Overmyer was to pay $4,300.00 per month to the mortgagee and was to make all tax payments when due.

At of the trial date, Overmyer had not made the $2,500.00 payments for six months (June through November of 1973.) Overmyer had, however, given the Wolfbergs a $5,000.00 note in lieu of the June and July payments, but the note, due by September 31, 1973, was never paid. (F36, F37).

Overmyer did not make the monthly $4,300.00 mortgage payments for the months of July, August, October and November of 1973. In July of 1973 the Wolfbergs received notice from the mortgagee of a mortgage foreclosure. Upon notifying Overmyer of the impending foreclosure, Overmyer wrote to the Wolfbergs'

Cleveland counsel that the matter had been taken care of. Overmyer's written statement was false. Mr. Wolfberg had to go to Denver to clear matters with the mortgage company which meant giving them a check for past due taxes and mortgage payments. (F43-F46).

Following this misadventure, on August 14, 1973, written notice of the Wolfbergs' intention to terminate the lease effective September 30, 1973 for failure to make mortgage payments and other defaults was sent. Overmyer did not cure the existing defaults in that period, or thereafter. In October of 1973, the Wolfbergs commenced suit in the local courts for possession of the property and damages. This suit was subsequently stayed by the Bankruptcy Court.

On trial, Overmyer established that the warehouse was presently operating at a profit. The subtenants paid $12,102 per month, while net rent, the mortgage payment and taxes were only $8,502.00 per month. This left Overmyer a gross profit of $3,600.00 per month or $43,200.00 per year. Operating overhead, including $2,400.00 per year for normal maintenance, was found by the trial court to be $20,000 per year, leaving a

net profit of $23,200.00 per year. Mr. Wolfberg testified as to a need for extensive repairs, but no dollar value was placed on them. A portion of these repairs, covering asphalt repaving, has just been contracted out for over $25,000.00. One of the sub-tenants has moved out and has not yet been replaced reducing the monthly-rent roll to $10,102.00.

Columbus #3; Norman S. Glauber, Jr.

In March of 1968, Mr. Glauber purchased certain real property located in Columbus, Ohio (known as the Columbus #3 warehouse) from Overmyer and leased the property back to Overmyer for a twenty year term. Under the terms of the lease Overmyer was to pay Glauber $6,700.34 as a monthly net rent and was also to pay taxes when due as additional rent. The rent increased according to the terms of the lease, Section 3.01(b) to $7,407.29 per month effective March 1, 1973.

As of the trial date, Overmyer had not paid the net rent due for October and November of 1973. More importantly, Overmyer had not paid $4,713.80 in taxes due to the Collector of Franklin County, Ohio when such taxes were due on or about

July 20, 1973. When advised of Overmyer's failure to pay the taxes and the assessment of a 10% penalty, Mr. Glauber elected to terminate the lease and sent a written notice to this effect dated August 22, 1973.

On trial Overmyer established that the warehouse was presently operating at a profit. The subtenants paid $10,422 for the month of January, 1974. However, one tenant, A-1 Skyway, which paid $2,300 per month, had a lease that expired on May 31, 1974 and Mid-West Warehousing, then operating 82,500 sq.ft. of the 120,000 sq.ft. total did not have a written lease (D19-D20). Overmyer paid Glauber $6,700.34 per month net rent (not considering a cost of living increase effective March 1, 1973*) and $786.00 a month in taxes. The gross profit was $2,986.00 for the month of January, 1974, and projecting the same profit margin, is $35,232.00 per year. Net, it is reduced to $15,232.00 per year. General repairs costing $2,400-$3,000 were necessary (D18-D21) and a needed paint job would cost $7,700.00 (D41, D45).

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* Putting the contractual cost of living increase into effect, Overmyer's profit is reduced by $706.95 per month or $8,483.52, leaving a net profit, assuming continuing full occupancy of less than $7,000.00 per annum.

Buffalo #2; Harold Y.I.Fanaberia

In December of 1971, Mr. Fanaberia purchased certain real property located in Buffalo, New York (known as the Buffalo #2 warehouse) from Overmyer and then leased the property back to Overmyer for a twenty year term, with two ten year renewal options. Overmyer was to pay net rent of $9,458.23 per month and the taxes. As of the trial date, the rents for October and November of 1973 were unpaid. Mr. Fanaberia also owned two other warehouses leased by Overmyer, located in Omaha, Nebraska and Birmingham, Alabama. These were unprofitable and were returned by Overmyer. On February 6, 1974, Mr. Fanaberia sent Overmyer written notice of termination effective February 21, 1974 based upon the bankruptcy clause in the lease.

On trial, Overmyer showed that the warehouse was sublet for $16,000.00 a month and yielded a gross profit of $5,324.00 per month, or $63,888.00 per year. Net profit was $43,888.00 per annum.

Miami #7; Rachel Fanaberia

In May of 1971, Mrs. Fanaberia purchased certain real

property located in Miami, Florida (known as the Miami #7 warehouse) from Overmyer and leased it back to Overmyer for a twenty year term with two ten year renewal options. Overmyer was to pay net rent of $11,102.00 per month and all taxes. As of the trial date, four months rent (August-November, 1973) totaling $44,408.00, was unpaid. On January 15, 1974, Mrs. Fanaberia mailed Overmyer notice of her election to terminate the lease effective January 25, 1974 based upon the bankruptcy clause.

On trial, Overmyer failed to establish the profitability of this warehouse. The single sub-tenant paid rent of $13,105.00 per month and the monthly pro-rata taxes were $1,440.00 per month (L6). The gross profit was thus $563.00 per month or $6,756.00 per year, for a net loss of $13,244.00 per year. Overmyer's briefs admit this loss.

Point I

THE BANKRUPTCY JUDGE'S REFUSAL TO GRANT OVERMYER EQUITABLE RELIEF WAS NOT AN ABUSE OF DISCRETION

Overmyer's defense is summed up in the words of Circuit Judge Timbers in In re Queens Boulevard Wine & Liquor Corp., docket no. 73-1512, 2d Circuit June 11, 1974:

> "...we find persuasive those cases relied upon by the district court which hold a lease termination provision to be unenforceable when compelling equitable and policy considerations so require." (Emphasis supplied.)

Circuit Judge Timber's closing words are also of significance:

> "Our decision does not deprive Section 70(b) of its statutory effect in those cases to which it is applicable. Bankruptcy forfeiture provisions are necessary for the protection of landlords and generally are enforceable. We hold only that, under the particular circumstances of this case, termination of Queen's lease would be grossly inequitable and contrary to the salutory purpose of Chapter XI."

(A) Section 70b generally requires enforcement of lease forfeiture clauses in the bankruptcy court.

Bankruptcy Act §70b, 11 U.S.C. §110b, provides that:

> "...an express covenant that ... the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the same is enforceable...."

This statutory language is given its clear meaning, and express covenants of forfeiture are enforceable against the bankruptcy trustee. Finn v. Meighan, 325 U.S. 300, 302 (1944). See also Speare v. Consolidated Assets Corp., 360 F.2d 882 (2d Cir. 1966); Geraghty v. Keamie Fifth Avenue Corp. 210 F.2d 95 (2d Cir. 1954); B.J.M. Realty Corp. v. Ruggieri, 326 F.2d 281 (2d Cir. 1964).

Thus Congress, backed up by the courts, has held bankruptcy forfeiture clauses to be generally and usually enforceable. Moreover, in each situation covered at bar there were other lease defaults which independent of the filing of Chapter XI petitions, constitute sufficient contractual basis for termination.

(B) The Bankruptcy Court's power to relieve against a lease forfeiture should only be exercised under unusual and compelling circumstances.

In Weaver v. Hutson, 459 F.2d 741 (4th Cir. 1972) and In re Fleetwood Motel Corp., 335 F.2d 857 (3d Cir. 1964) two chapter X reorganization courts refused to permit enforcement of termination clauses under the circumstances of the two cases. Both cases must be limited to their facts.

The Weaver case was concerned with the reorganization of a corporation who constructed and operated a motor hotel on leased property. The lease, which commenced on March 27, 1964 had a 52 year term. "The land had been acquired by Landlords in 1942 for $3,100.00 and, at the commencement of the bankruptcy hearing, was valued at $150,000.00 without improvements....the total appraised value of [the hotel], including land, fixtures, equipment and furniture, is approximately $2,000,000.00." Id., 459 F.2d at 742. The trial court had refused forfeiture because

> "...all rentals and percentages have been satisfied; that through the bankruptcy trustee's assurance, Landlords have been relieved of any duty to pay the second trust of $110,000.00; that under the guidance of the trustee the motel is a successful operation; that the Landlords' financial interests are not in jeopardy; that, as feared by the Securities and Exchange Commission, appellee, a forfeiture would cause complete loss to Debtor's creditors, stockholders and debenture holders, and, finally, that forfeiture would prove a windfall of about $1,000,000.00 for Landlords." Id., 459 F.2d at 743.

On a petition for rehearing the court reiterated:

> "....The fundamental basis of decision throughout was that the Landlords' insistence upon forfeiture was highly unconscionable and inequitable in the circumstances - a demand for blood. The conclusion generally was that as a court of equity the bankruptcy court had the discretion and power to refuse enforcement of paragraph 12 [the termination clause], and rightfully exercized that prerogative." Id., 459 F.2d at 745.

The Fleetwood case also involved a corporation that constructed and operated a motel on leased property, the lease having a 99 year term. The findings of fact indicated that the hotel plus fixtures and furniture cost $1,551,119.52 and had a then depreciated book value of $1,398,698.57. The mortgagee was only owed about $622,942.79. There were public shareholders who had invested $118,867.77, debenture holders in for $274.700.00 and a paid in capital surplus of $179,913,28. All would be wiped out by permitting the landlord to take the property. Under the circumstances the court held that it was unconscionable to permit a forfeiture to the Landlord.

The facts in the Queens Boulevard case also cried out for the exercise of the court's discretionary equitable powers. As catalogued by Bankruptcy Judge Babitt:

> "In Queens Boulevard...the debtor conducted its business from a single site, the site which the landlord sought to reclaim. There was virtually no impedence of the landlord for rent arrearages was but for one month, and there was a security deposit available to the landlord for application against due rent. Tender was once made on certain conditions which the landlord found to be satisfactory but later refused by a landlord motivated by visions of a more affluent tenant for the premises. Finally that debtor's arrangement stood on

> the verge of confirmation by reason of the debtor's success in its Chapter XI operations. Moreover, the Court of Appeals found evidence which gave weight to the debtor's argument that the landlord might have been estopped from seizing on the "bankruptcy clause" of the lease...The "bankruptcy clause" was amended to permit termination upon the condition that there be no forfeiture if obligations under the lease should remain unaffected by the bankruptcy proceedings and if the tenant should continue to comply with the terms of the lease, including prompt payment of rent."

And the Circuit Court limited their decision to the facts of that case.

(C) The equitable considerations at bar mandate enforcement of the contractual provisions.

In the words of Bankruptcy Judge Babitt:

> "....The defaults here are staggering. Only substantial divestment of some of its warehouses has given the receiver the wherewithall to operate even marginally. Many of the landlords have had to invest further funds of their own to keep mortgagees and tax gatherers at bay. These twenty properties are not the debtor's only warehouses, although, to be sure, they do yield profits of varying amounts. Here, there has been no tender, nor could there be in light of the aggregate of the pre-petition debt due these landlords who make up the bulk of the debtor's creditors. The termination clauses here speak plainly and the debtor gave itself no ameliorative options such as the Queens Boulevard debtor enjoyed. The landlords' assaults have continued unabated without the kind of forebearing action taken by the Queens Boulevard landlord. They have consistently pressed for their end of the bargain.

"Finally, the debtor's offer to its creditors, including these landlords, carries pie-in-the-sky elements. The debtor's arrangement (popularly styled its plan) calls for full payment of all pre-petition liabilities--but not at the time the court confirms the arrangement; rather over many years. The arrangement ignores the reality--that even if the court continues to keep the landlords at bay until the proposal is confirmed, it does not ensure that the unwilling landlords will relent and re-negotiate the terminated leases. At best, the landlords may insist on new leases far more favorable to them thereby inhibiting the debtor's chances of yielding enough from its operation to pay off its creditors. Thus, the debtor's plan may not even be feasible much less in the best interests of its creditors, indispensable ingredients precedent of the court's duty to confirm. Section 366(2) of the Act, 11 U.S.C. §766(2); In re Grace, Inc., 364 F.2d 257 (2d Cir. 1966); Technical Color and Chemical Works v. Two Guys from Massapequa, Inc., 327 F.2d 737 (2d Cir. 1964). The debtor does not even suggest how it will garner the acceptances by the landlords to its long term proposals, also a condition precedent to confirmation under Section 362(1) of the Act, where, by simply waiting, the landlords could regain their properties. No case has been cited for the proposition that non-enforcement after a debtor has emerged from the court and Queens Boulevard does not appear to go that far.

"But this last observation is by the way for I am satisfied that given the enforceability of the lease provision here in issue as mandated by Section 70b of the Act and, inter alia, Finn v. Meighan, supra, the so-called equitable concerns are simply not robust enough to turn these landlords away. There is simply no strong public interest to support such a result. The so-called "windfall" to these landlords is part of what they bargained for...." (Appendix, at 52-54.)

Judge Babitt concentrated on the factors present in the Queens Boulevard case, supra. That case, like the ones at bar, involved the arrangement under Chapter XI of a privately held corporation. The only public interest involved in either case was that of creditors. Judge Babitt considered the major factors found in the Queens Boulevard case. The first factor was the question of whether the landlord was seriously impeded by the debtor's actions. He noted that in Queens Boulevard, there was no impedence at all. The rent arrears in that case were only one month; the landlord held a security deposit which could be applied to pay that rent; and the tenant-debtor made tender of the arrears which the landlord refused.

At bar the Bankruptcy Judge found serious impedence. The arrears were substantial. The monetary defaults in regard to the four landlords represented by this brief range from $18,000 to $44,000 per warehouse. Aside from these arrears, the receiver, though doing an admirable job running the debtors' business, was approximately two months behind in use and occupation (or rent) payments during the pendency of the arrangement proceedings. Thus he used his July income plus short term borrowings to pay rent that has accrued for the month of June. No rent has been paid for July, 1974. Landlords have

mortgage commitments to meet and the cost of borrowing money today is at a modern day high. Furthermore, the four landlords represented herein hold no security deposits as did the landlord in the Queens Boulevard case.

Second Factor. Furthermore, there has been no tender of arrears as there was in the Queens Boulevard case. The receiver seeks to excuse his lack of tender on two grounds. First, it is claimed that tender would have been futile (App. V.2 at 97.) In support of this argument the receiver makes a statement "that the landlords generally testified that if arrears were tendered, the landlords would reject them..." This statement was supported by quotes from three landlord witnesses (Richmond #1, Denver #4 and Edison #24) This may have rendered tender futile in those situations but is no evidence that a similar attitude was shared by the landlords of Columbus #3, Miami #7 and Buffalo #2. The receiver also seeks to hide behind sections 337(2) and 367(3) of the Act, 11 U.S.C. §§737(2) and 767(3), which are claimed to prohibit "payment of pre-petition debts, except as part of a plan involving payment to all creditors..." (App. V.2 at 94.) In reading these sections their relevance is questionable.

It stands to reason that the Bankruptcy Court could authorize Overmyer to pay or tender the arrears if the result of such tender or payment was to preserve a valuable asset to the benefit of the estate. It is obvious from the continued late payment of use and occupation that the reason that there was no tender or payment is that the funds did not exist.

Furthermore, this position is directly contradictory to the actual conduct of Overmyer in certain instances. Overmyer settled one or more landlord suits similar to those on appeal on the following basis:

(a) the rental payment to the landlord under the lease was increased;

(b) the pro rata taxes would be paid directly to the landlord with the rent;

(c) the pre-petition arrears plus liberal attorneys' fees would be paid to the landlord as additional rent, so much per month, until the total sum was paid; and

(d) the rent, taxes and additional rent would be paid on or about the first of the month when due, while other landlords would wait approximately two months for their rent.

Third factor. In the Queens Boulevard case, the arrangement was on the verge of confirmation. In fact while the district court's determination was sub judice, the arrangement was confirmed. At bar the proposed arrangement has been rejected by the Official Creditors' Committees. As noted by the Bankruptcy Judge, landlords, including the 15 remaining appellees, and other landlords whose unprofitable warehouses have been returned to them, constitute the major part of the creditor body. These landlords must accept an arrangement before there can be a confirmation. In fact, the arrangement filed with the court, i.e., the one that has been rejected by the creditors, sets up two classes of creditors. One class is made up of the landlords who are appealing. Before the arrangement can be confirmed, the appellees would have to accept the plan. This is highly unlikely. Furthermore, as noted by Bankruptcy Judge Babitt, who has a close feeling for the pulse of these arrangement proceedings, and also District Judge Werker, there is a question as to whether the arrangement proposed will be either feasible or in the best interests of creditors, both conditions precedent to confirmation of an arrangement. See Bankruptcy Act §366(2), 11 U.S.C. §766(2).

Fourth factor. In the Queens Boulevard case, the court also noted the presence of an estoppel against the landlord. The court did not rely on this estoppel for its decision but the estoppel was certainly an element that went into its determination of the existing equities. At bar, as noted by the Bankruptcy Judge [App.at 45]:

> "Nor do the receiver and the debtor[s] seriously press the Court to find waiver by or estoppel of the landlords; in any event the evidence of record is insufficient to support a finding that either of these events has occurred."

In fact, in the four cases covered by this brief, there was no affirmative defense of waiver or estoppel and at the trials no evidence was submitted that indicated the existence of such a defense.

Fifth factor. The lease in the Queens Boulevard case contained an exculpatory clause. This clause, as noted by Bankruptcy Judge Babitt (App.at 52) would permit termination only "upon the condition that there be no forfeiture if obligations under the lease should remain unaffected by the bankruptcy proceedings and if the tenant shall continue to comply with the terms of the lease, including prompt payment of rent." This clause seriously weakened the contractual right which the Queens Boulevard landlord was seeking to enforce. No such clause exists in any of the four leases at bar.

Sixth factor. Bankruptcy Judge Babitt recognized and found that the litigated leases were profitable. This was not always the case, and may be the reason why Overmyer has withdrawn its appeals in regard to nine landlords. In regard to the Miami #7 warehouse the trial record indicates that the lease was unprofitable with a net loss of $13,244.00 per year. In recognizing a similar net loss, Overmyer notes that:

> "The profitability of the Miami No. 7-9 warehouse does not appear from the record." [App. V.2 at 120.]

This is quite true. The record shows that that warehouse is unprofitable.

Seventh factor. The court considered the issue of windfall but did not find it to be the controlling factor. The court made its determination assuming that the landlords would receive a "windfall." Appellees note for the record that no proof of the value of the debtors' leasehold interest was offered in any of the four trials. No proof was offered as to whether the landlords' recovery of their property would give them a "windfall." Under their leases with the debtors the landlords were assured of a fixed income, assuming the

debtors would pay, no matter what the actual income of the warehouse was. Now the landlords who recover their warehouses will be subject to the vagaries of market conditions. Their overhead should be greater than that of the debtors because there are no economies of scale. There may well be vacancies that will be difficult to fill, that will reduce the gross income of each property. In other words the record gives no assurances that the landlords, who will have to amortize their already substantial losses from any operating profit, will in actuality receive any benefit from the return of their premises other than to be quit of an impossible tenant and to be in control of their property.

Other factors. As noted by District Judge Werker:

> "....On the record it would appear that for a period of years prior to its filing under the Bankruptcy Act, Overmyer's conduct with respect to many of the landlords formed a pattern of consistent failure to meet its rent, repair, mortgage and tax obligations. Just prior to filing its Chapter XI petitions, Overmyer made promises with respect to remedying these defaults which could only have been made with an intention to deceive. This modus operandi is not new to the Courts. See D. H. Overmyer Co. v. Frick, 405 U.S. 174 (1972). The record is barren, on the other hand, of any conduct on the part of the landlords which could in any way be described as unfair, overreaching or vexatious." (15, 16).

* * * *

"....defaults were repetitive, long-standing, and seriously impeded the financial position of the Landlords. Negotiation on the continuation of the leases was an impossibility, for the experience of the landlords with Overmyer negated further forebearance." (17).

* * * *

"The evidence...demonstrates a course of conduct on the part of Overmyer which warrants the exercise of discretion in the landlords rather than appellants' favor." (23)

(D) Absent an "abuse of discretion" the orders below must be affirmed.

The conflict between the landlords and Overmyer is a conflict between a landlord seeking to enforce a legal right to terminate a leasehold and a tenant whose only defense is a cry of "inequity." As demonstrated by this court's decision in the Queens Boulevard case, the rule favors the enforcement of termination clauses; exercise of the court's equitable powers to subvert the Congressional mandate of Bankruptcy Act §70b is the exception and is clearly addressed to the trial court's discretion.

The rule in this Circuit regarding appellate review of the trial court's discretionary determinations is clear. In Nichols-

Morris Corp. v. Morris, 272 F.2d 586, 589 (2d Cir. 1959) Circuit Judge Swan cited the first circuit's decision in Cameron v. President and Fellows of Harvard College, 157 F.2d 993, 997 (1st Cir. 1946) with approval:

> "Decisions reached by an exercise of judicial discretion * * * are reviewable, if they are final, although of course, on appeal the scope of review is limited to the question of abuse of discretion."

See also Sampsell v. Monell, 162 F.2d 4, 7 (9th Cir. 1947).

This rule applies in bankruptcy controversies. As stated by Judge Weinfeld in In re New York Investors Mutual Group, 143 F. Supp. 51, 56 (S.D.N.Y. 1956):

> "....To overcome the Referee's order approving the same [disaffirmance of a contract] it must be established that his findings were clearly erroneous. And in this instance there is involved a matter of business judgment and discretion which will not be disturbed unless there is a clear abuse of discretion."

There are further guidelines. In Brunner v. United States, 190 F.2d 167, 170 (9th Cir. 1951), rev'd 343 U.S. 918 (1952) the circuit court said:

> "....Where the law commits a determination to a trial judge and his discretion is exercised with judicial balance, the decision should not be overruled unless the reviewing court is actuated, not by a desire to reach a different result, but by a firm conviction that an abuse of discretion has been committed."

In Young v. Garrett, 159 F.2d 634 (8th Cir. 1947) the circuit court said:

> "...where an appellate court has power to review exercise of judicial discretion, the inquiry is limited to whether the action is arbitrary in that the court failed to apply the appropriate equitable and legal principals to the established or conceded facts...."

Thus District Judge Werker's review was proper:

> "This Court is convinced that there was no clear error by the Bankruptcy Judge with respect to the facts. It is equally pursuaded that upon those findings the question which Judge Babitt was required to decide was one of law, i.e., whether upon the facts of this case and prior decisions in this Circuit he should exercise his discretion in equity to set aside the termination of the leases, whether terminated before the Chapter XI petitions or thereafter." (22)
>
> * * *
>
> "....It is the conclusion of this Court therefore that there was no abuse of discretion on the part of the Bankruptcy Judge in failing to exercise his discretion in favor of the appellants." (24)

This court should reach the same conclusion and affirm, following its rationale in In re Yale Express Systems, Inc., 384 F.2d 990, 991 (2d Cir. 1967).

Point II

THE DENVER #4 AND COLUMBUS #3 LEASES WERE PROPERLY TERMINATED

Point I of the receiver's brief on appeal concerns itself with four leases which were declared terminated by the Bankruptcy Court for non-bankruptcy defaults. The landlords of the Denver #4 and Columbus #3 warehouses respond to the arguments herein.

The receiver's arguments, found at pages twenty-five through thirty-three of his brief, are essentially that the landlords of the Denver #4 and Columbus #3 warehouses did not comply with the contractual terms contained in the respective leases in exercizing their respective options to terminate. Accordingly, the receiver's answers in response to the two applications stated as a third affirmative defense:

> "Upon information and belief the application was premature in that the Landlord has not given the proper notice or notices of termination of the Lease required under the Lease."

The Colorado and Ohio debtors adopted the receiver's answers as their own.

Following trial, the landlords of the Denver #4 and Columbus #3 warehouses submitted post-trial memoranda to Bankruptcy Judge Babitt. (They were inadvertently omitted from the record.) The pertinent parts of the memoranda are set forth on the following pages. The court should note that the operable events of default were governed by lease section 15.01(a)(ii) as opposed to section 15.01(a)(i) and no notice of non-payment is required under subsection (a)(ii).

Overmyer's effort to show that Colorado and Ohio law would deny forfeiture, is the first time such law is cited in these two cases. Whether or not such law applies, it is preposterous that a court of equity such as the bankruptcy court would be less liberal than a state court in denying forfeiture on equitable grounds. Nor is Overmyer's rendition of the law correct. Thus the case of Audobon Commercial Area Co. v. Skelly Oil Co., 268 F. Supp. 883 (D.Col. 1967) is relied on for the proposition that a demand for overdue rent is a condition precedent to termination. This is true where the operable event of default is the payment of rent, which is

POINT I

THE LANDLORDS EXERCIZED THEIR CONTRACTUAL OPTION TO TERMINATE THE LEASE PRIOR TO PETITION FILING

Section 15.01 of the lease agreement (Request for Admissions, Exhibit A and ¶3)* provides, inter alia, that:

> "Any of the following occurrences or acts shall constitute an event of default under this lease:
> (a) if Tenant...shall fail to
> (i) make any payment of net rent within ten (10) days after Landlord shall have given notice to Tenant that such payment is due, or
> (ii) make any payment of additional rent or any other sum herein specified to be paid by Tenant,..."

Under the Lease, (Adm. Ex. A) Overmyer was required to pay the Landlord's rent of $2,500 per month on the first day of each month (Adm., ¶4). See lease section 3.01. It is admitted that the following relevant rent payments were not made:

Amount	Due Date	Reference
$2,500	06/01/73	Adm., ¶5
$2,500	07/01/73	Adm., ¶6
$2,500	08/01/73	Adm., ¶7

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* Hereinafter "Adm., Ex. __" or "Adm., ¶__."

Under the Lease (Adm., Ex. A) Overmyer was required to pay the sum of $4,300 to the mortgagee, Mutual of New York ("MONY") every month as additional rent. (Adm., ¶14.) See Lease Section 3.02. It is admitted that the following relevant mortgage payments were not made.

Amount	Period	Reference
$4,300	July, 1973	Adm., ¶15
$4,300	August, 1973	Adm., ¶16

Section 15.02 of the Lease provides, inter alia, that:

> "If an event of default shall have happened and be continuing, the Landlord shall have the right at his election, then or any time thereafter while such event of default shall continue, to give Tenant written notice of Landlord's intention to terminate the term of this Lease on a date specified in such notice, which date shall not be less than thirty (30) days after the date giving such notice."

On or about August 14, 1973 Landlords mailed to Overmyer written notice (Adm.,Ex.C) of Landlords' intention to terminate the term of the lease on September 16, 1973. (Adm.,¶20). Overmyer received this notice and the defaults were not cured by September 16, 1973. (Adm.,¶21). The lease term was accordingly terminated on September 16, 1973, well before petition

filing on November 16, 1973 (Adm., ¶24). As stated in section 15.02 of the Lease:

> "...and on the date specified in such notice all right, title and interest of the Tenant hereunder shall thereupon expire as fully and completely as if the date specified in such notice were the date specifically fixed herein for the expiration of the term of the Lease..."

In October of 1973 the Landlords commenced a suit against Overmyer in the Colorado District Court seeking possession of the warehouse, damages, etc. See Applicants' exhibit 1 in evidence. This suit was stayed by action of this court.

POINT I

THE LANDLORD EXERCISED HIS CONTRACTUAL OPTION TO TERMINATE THE LEASE PRIOR TO PETITION FILING

Section 15.01 of the lease agreement (Request for Admissions, Exhibit A and ¶3)* provides, inter alia, that:

> "Any of the following occurrences or acts shall constitute an event of default under this lease:
> (a) if Tenant ... shall fail to
> (i) make any payment of net rent within ten (10) days after Landlord shall have given notice to Tenant that such payment is due, or
> (ii) make any payment of additional rent or any other sum herein specified to be paid by Tenant, or
> (iii) observe or perform any of Tenants other covenants, agreements or obligations hereunder, within thirty (30) days after Landlord shall have given notice to Tenant specifying such default ..."

Pursuant to the terms of the Lease, (Adm. Ex. A) Overmyer was required to pay all taxes on the lease premises when due as additional rent. (Adm., ¶7). See lease section 3.03. Taxes in the sum of $4,713.80 became due to

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* Hereinafter "Adm., Ex. __" or "Adm., ¶__."

the Treasurer of Franklin County, Ohio on or about July 20, 1973 and were not paid by Overmyer. (Testimony, p. 7, l. 19 through p. 8, l. 5).*

Section 7.01 of said lease (Adm., Ex. A) provides that the Tenant may assign the lease or sublet the whole or any part of the warehouse. That section then states,

> "In that event, Tenant agrees promptly to furnish Landlord with a conformed copy of any such assignment or sublease together with an agreement in writing by any such assignee or subtenant to assume the obligations imposed by this Lease upon the Tenant to perform in accordance with the terms hereof ...."

A portion of the leased premises were sublet to various persons (Adm., ¶14). As testified by Mr. Glauber, he never received copies of any assignments or subleases from Overmyer or any written undertaking by the subtenants as provided for in section 7.01 of the lease. (T., p. 8, ll. 6-13).

It is further noted that the rental payments due under the lease on October 1, 1973 and November 1, 1974 were not paid (Adm., ¶¶4, 5 and 6).

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*Hereafter,"T., p.__, ll. __-__."

Section 15.02 of the Lease provides, inter alia, that:

> "If an event of default shall have happened and be continuing, the Landlord shall have the right at his election, then or any time thereafter while such event of default shall continue, to give Tenant written notice of Landlord's intention to terminate the term of this Lease on a date specified in such notice, which date shall note be less than thirty (30) days after the date of giving such notice."

On or about August 22, 1973 Mr. Glauber's attorney, Leonard S. Danaceau, sent a letter to Overmyer together with a notice from Mr. Glauber (Collectively, Applicant's Ex. A. in evidence), to the effect that he was exercizing his option to terminate the lease term effective September 30, 1973. The defaults were not cured and the lease terminated on September 30, 1973.

almost always paid to the landlord. Thus section 15.01(a)(i) of the Denver #4 lease requires ten days notice of non-payment before termination. But traditionally, leases do not require such notice or demand where the rental payment, as at bar, is to go to a third party such as a mortgagee or taxing authority. The rationale is apparent; mortgages and taxing authorities can foreclose. In the Audobon case, rent to the landlord was at issue, and the lease in question permitted termination without demand or any grace period. It is finally noted that the termination clause drawn by Overmyer provides for thirty days between the landlord's notice and actual termination. This, in effect, constitutes a thirty day grace period. If the defaults are cured in that period, it is unlikely that a court would enforce forfeiture. At bar the defaults were not cured.

On the Denver #4 lease the operable event of default was the failure to pay mortgage installments which under section 3.02 of the lease constituted "additional rent." In the Columbus #3 situation, the operable event of default was the non-payment of taxes which constituted "additional rent" under sections 3.02 and 3.03 of the Columbus #3 lease.

Overmyer also filed post-trial memoranda in regard to these cases. (These memoranda were also inadvertently omitted from the record on appeal which was compiled by Overmyer.) These memoranda totally ignored Overmyer's third affirmative defense. This is clearly why a reading of Bankruptcy Judge's opinion discloses no discussion of this issue.

Rule 806 of the Rules of Bankruptcy Procedure requires an appellant to submit "a statement of the issues he intends to present on the appeal...." at the same time that the appellant designates the record on appeal. This is analgous to the present practice before this court but is derived from Bankruptcy Act §39c, 11 U.S.C. §67c. Section 39c of the Act formerly required that a petition for review "set forth the order complained of and the alleged errors in

respect thereto." The cases decided under that section indicate that matters not set forth and briefed before the bankruptcy court will be considered waived. In re McCann Bros. Ice Co., 171 Fed. 265 (D.Pa. 1909). Also considering §39c of the Act, it has been held that if issues are set forth in the petition for review but not briefed and argued by appellant's counsel, they are deemed abandoned. In re Boros & Reiss Art Weave Mills, Inc., 149 F.Supp. 28 (D.N.J. 1957).

At bar, Overmyer (the receiver and debtor separately) designated issues for the appeal to the district court pursuant to Rule 806. These issues do not include the landlords' proper exercise of their contractual rights. Nor did the Overmyer briefs before the district court argue that point. This issue, must therefore, be deemed waived and/or abandoned for the purposes of this appeal.

Therefore these two cases must be considered in the same basic terms as the bankruptcy clause default cases. Each landlord has a legal, contractual right to terminate the leases and took the appropriate steps to exercise those rights. The only defense available to the receiver and the only de-

fense raised and litigated by the receiver was that to permit the landlords to enforce their contractual rights would be inequitable. And, this defense raises the only issues which are properly before this court on appeal.

CONCLUSION

There is ample basis in the record to support the District Court's conclusion that the Bankruptcy Judge did not abuse his discretion in refusing to prevent forfeiture of Overmyer's leases with the respective landlords. The Bankruptcy Court's orders must be affirmed.

Respectfully submitted,

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Of Counsel.

State of New York)
ss.:
County of New York)

Algernon Handy, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides in the City, County and State of New York. On November 12, 1974, deponent served the within "Appellees' Brief" upon Booth, Lipton & Lipton, attorneys for the receiver, and Levy, Levy & Ruback, attorneys for the debtors, in this action, at 292 Madison Avenue, New York, New York and 225 Broadway, New York, New York, respectively, by delivering a true copy thereof to each of said firms personally. Deponent knew the party or parties so served to be employed by, associated with and/or a member of the said firms described in the said brief as attorneys for the receiver and debtor, respectively, therein.

Algernon Handy

Sworn to before me on
November 12, 1974

Notary Public

MARVIN DAVID COHEN
Notary Public, State of New York
No. 24-4515168
Qualified in Kings County
Commission Expires March 30, 1975